



Federal Communications Commission
Washington, D.C. 20554

August 1, 2002

DA 02-1889

Via Certified Mail, Return Receipt Requested

Timothy E. Welch
Hill & Welch
1330 New Hampshire Ave., N.W. #113
Washington, D.C. 20554

Re: Auction No. 40 – Petition for Reconsideration

Dear Mr. Welch:

This letter responds to the petition filed on behalf of Mobilfone Service, Inc. (“Mobilfone”) seeking reconsideration of the Auctions and Industry Analysis Division’s denial of a bidding credit for licenses won by Mobilfone in Auction No. 40.¹ Mobilfone contends that its October 4, 2001 resubmitted short-form application (FCC Form 175) included information sufficient to make it eligible for a bidding credit in Auction No. 40. Alternatively, Mobilfone argues that the Paperwork Reduction Act prohibits the Commission from penalizing Mobilfone for its failure to comply with the Commission’s requirement that applicants seeking a bidding credit provide certain information on their short-form applications. For the reasons discussed below, Mobilfone’s arguments do not merit reconsidering its bidding credit request.

Parties seeking to participate in Auction No. 40 were required to submit a short-form application no later than 6 p.m. ET on September 17, 2001.² The Commission’s rules require applicants seeking bidding credits to disclose certain information in their short-form applications, in part by listing the names, addresses, and citizenship of all officers, directors, and other controlling interests; and by listing gross revenues of the applicant, its affiliates, its controlling interests, and the affiliates of its controlling interests.³ The Commission’s rules also provide applicants a limited opportunity to cure

¹ In the Matter of Recission of Auction Bidding Credit for Mobilfone Service, Inc. – Auction No. 40; Petition for Reconsideration and Request for Reinstatement of 25% Bidding Credit (filed November 15, 2001) (“Petition”). Contrary to the implication of the Petition’s caption, Mobilfone never received a bidding credit in connection with Auction No. 40. See Letter to Timothy E. Welch from Kathryn Garland, October 17, 2001, attached to Petition.

² Lower and Upper Paging Bands Auction Scheduled for October 30, 2001, DA 01-1961, *Public Notice*, 16 FCC Rcd 15,430 (2001).

³ 47 C.F.R. §1.2112(b)(1)(i) and (iii); see Wireless Telecommunications Bureau Staff Provides Guidance on Completing the Short-Form Application (FCC Form 175) for Auction No. 40, Auction of Licenses for Lower and Upper Paging Bands, DA 01-2122, *Public Notice*, 16 FCC Rcd 16,391, 16,393-94

specified defects in their short-form applications and to resubmit a corrected application.⁴ For Auction No. 40, parties could resubmit corrected short-form applications until 6 p.m. ET on October 5, 2001.⁵

Mobilfone timely submitted its initial short-form application. Upon review, the Commission found Mobilfone's initial short-form application incomplete.⁶ Mobilfone resubmitted its short-form application on October 4, 2001. Mobilfone's October 4, 2001 resubmitted short-form application did not identify which persons serve as Mobilfone's corporate directors or officers, with the exception of its corporate President.⁷ Therefore, Mobilfone's request for a bidding credit was denied, although its short-form application to participate in Auction No. 40 was accepted.⁸ Mobilfone participated in Auction No. 40 without a bidding credit. On November 15, 2001, well after bidding commenced in Auction No. 40, Mobilfone filed its Petition.⁹

Mobilfone must establish its eligibility for a bidding credit based on information it submitted to the Commission prior to the October 5, 2001 short-form application resubmission deadline. After the October 5, 2001 resubmission period deadline, applicants could make only minor changes or correct minor errors in their short-form applications.¹⁰ If an applicant has not established eligibility for a bidding credit by the resubmission deadline, any change that would make an applicant eligible for a bidding credit would be an impermissible major change.¹¹

(2001) ("all applicants seeking bidding credits must list 'the names, addresses, and citizenship of **all** officers, directors, and other controlling interests[.]' . . . To avoid any uncertainty, applicants should state that their application provides a complete list of relevant parties.") (emphasis in original; citation omitted).

⁴ 47 C.F.R. §1.2105(b)(2).

⁵ See Auction of Licenses for Lower and Upper Paging Bands, DA 01-2262, *Public Notice*, 16 FCC Rcd 17,185 (2001) ("*Auction No. 40 Status Public Notice*").

⁶ *Auction No. 40 Status Public Notice*, 16 FCC Rcd at 17,204.

⁷ Petition at 1-2. As indicated in the Petition, Mobilfone's initial September 16, 2001 short-form application further stated that Mark E. Staley serves as Mobilfone's President/Director and Paul C. Staley serves as Mobilfone's Vice-President/Director. This statement was deleted when Mobilfone resubmitted its short-form application on October 4, 2001. Mobilfone's resubmitted short-form application separately gave Mark E. Staley's title as President and did not identify any party as a director.

⁸ See Letter to Timothy E. Welch from Kathryn Garland, October 17, 2001, attached to Petition.

⁹ Auction No. 40 commenced on October 30, 2001.

¹⁰ 47 C.F.R. §1.2105(b)(2).

¹¹ See *Two Way Radio of Carolina, Inc.*, *Memorandum Opinion and Order*, 14 FCC Rcd 12,035, 12,039 ¶8 (1999) ("modification of an applicant's small business status [*i.e.*, bidding credit eligibility] does not constitute a minor change under our competitive bidding rules").

Mobilfone asserts that the Commission's rules require only that applicants include the names, addresses and citizenship of officers and directors on their short-form applications, but that applicants need not identify which of the persons named in that application serve as the applicant's officers and directors. Section 1.2112(b)(1)(i) states that, in disclosing information required for a bidding credit, applicants must "[l]ist the names, addresses, and citizenship of all officers, directors, and other controlling interests of the applicant, as described in §1.2110."¹² When adopting Section 1.2112(b)(1)(i) and the requirement that applicants claiming small business bidding credits identify controlling interests, the Commission observed that "application of the 'controlling interest' standard will ensure that only those entities truly meriting small business status qualify for our small business provisions."¹³ The rule's purpose in this regard cannot be achieved absent meaningful disclosure of which persons serve as the applicant's officers and directors. We reject Mobilfone's strained construction of the section because allowing applicants to list names without identifying information would deprive the Commission of information necessary to conduct its controlling interest analysis.¹⁴

The Commission's rules governing the short-form application process are designed to identify qualified bidders from among the applicants to participate in a timely manner prior to the auction. The burden of providing information and demonstrating qualifications by the applicable deadlines falls on the applicants, not the Commission.¹⁵ Where, as here, routine enforcement of regular procedures provides applicants with every opportunity to obtain the full benefits to which they are entitled under the Commission's rules, the Commission's competitive bidding rules and the public interest are best served by fair and consistent enforcement of those rules and procedures, including applicable deadlines. The public interest in a transparent auction process which assures that applicants satisfy eligibility qualifications prior to the auction could be substantially impaired if the Commission is required to guess whether applicants qualify for bidding credits.

In the alternative, Mobilfone argues that it cannot be penalized for its failure to comply with the disclosure requirement imposed by Section 1.2112(b)(1)(i). According

¹² 47 C.F.R. §1.2112(b)(1)(i).

¹³ Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, WT Docket No. 97-82, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15,293, 15,323, ¶59 (2000) ("*Part 1 Fifth Report and Order*"). See *id.* at 15,324, ¶62 (applicant has disclosure obligation).

¹⁴ Mobilfone's resubmitted short-form application identified only one of its officers and none of its directors, leaving the Commission to guess the identities of the directors and other officers, as well as their attributable gross revenues.

¹⁵ See *id.* at 15,324, ¶62 (applicant has disclosure obligation); see also 47 U.S.C. §309(j)(5)(participation in auctions prohibited "unless such bidder submits such information and assurances as the Commission may require").

to Mobilfone, the Paperwork Reduction Act¹⁶ requires that, in order to enforce Section 1.2112(b)(1)(i), the Commission must display a valid OMB document control number for the information collection imposed by that section either in the rule or in the Commission's list of OMB control numbers published in the Code of Federal Regulations ("CFR").¹⁷

The Commission displays an OMB control number pertaining to the collection in the CFR. The Commission adopted the current Section 1.2112(b)(1)(i) as part of a broader revision of the Commission's Part 1 rules.¹⁸ The Commission gave public notice of, and sought comment on, information collections related to these revisions in the *Part 1 Fifth Report and Order*.¹⁹ In addition, the Commission sought comment on those information collections, including the Section 1.2112(b)(1)(i) collection regarding bidding credits, when seeking an extension of OMB's prior approval of information collections required of auction participants under OMB control number 3060-0767, Auction Forms and License Transfer Disclosures.²⁰ Once OMB approved the collections as modified by the *Part 1 Fifth Report and Order*, the Commission displayed the requisite OMB control number in Section 0.408 of the CFR's Title 47.²¹ OMB rules provide that when a collection of information is published in the CFR, such as the collection of information published in Section 1.2112(b)(1)(i), placement of the control number in a table or codified section of the Code adequately displays the number.²² This is precisely what Section 0.408 of the Commission's rules does.²³ Notwithstanding

¹⁶ 44 U.S.C. § 3501, *et seq.*

¹⁷ See 47 C.F.R. §0.408.

¹⁸ See generally *Part 1 Fifth Report and Order*.

¹⁹ *Id.* at 15,335; ¶92; 65 Fed.Reg. 52,323, 52,335-36.

²⁰ See Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, 65 Fed.Reg. 67,744, 67,745 (2000) ("The information is used to ensure that applicants are qualified to participate in Commission auctions and to ensure that license winners are entitled to receive small business preferences.") In addition, the Commission submitted the *Part 1 Fifth Report and Order* information collections to OMB when seeking an extension of OMB's approval of the information collections in FCC Form 175. See *id.*, 65 Fed.Reg. at 67,745. The instructions for FCC Form 175 tell applicants to "list in an exhibit the specific ownership information as set forth in 47 C.F.R. §1.2112." Form 175, October 2000, at 4 (available at <http://www.fcc.gov/formpage.html>.) OMB approved the requested extension and the Commission displayed the OMB control number for FCC Form 175. See 47 C.F.R. §0.408 (OMB Control No. 3060-0600). Consequently, although the information is collected in an exhibit rather than in the form itself, OMB approved the information collection in Section 1.2112(b)(1)(i) when it approved the information collections in FCC Form 175, as well as when it approved the information collection directly, as described above.

²¹ 47 C.F.R. §0.408. Given that the Commission complied with the Paperwork Reduction Act, we need not consider Mobilfone's assertions regarding the consequences of non-compliance.

²² 5 C.F.R. § 1320.3(f)(3).

²³ See *AirTouch Paging Inc., Order*, DA 99-1175, ¶8 (rel. June 16, 1999).

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Mobilfone's assertions to the contrary, the Paperwork Reduction Act and OMB's implementing regulations do not require a separate OMB control number for every rule section that mandates an information collection.²⁴

For the foregoing reasons, Mobilfone's Petition is denied. This action is taken under authority delegated pursuant to Section 0.331 of the Commission's rules.²⁵

Sincerely,

Kathleen O'Brien Ham
Deputy Chief
Wireless Telecommunications Bureau

²⁴ *Id.*

²⁵ 47 C.F.R. §0.331.